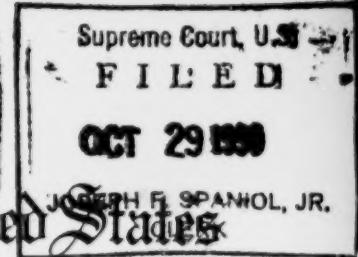


90-687

No. 1

In The
Supreme Court Of The United States



OCTOBER TERM, 1990

OSCAR THEODORE POLK, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

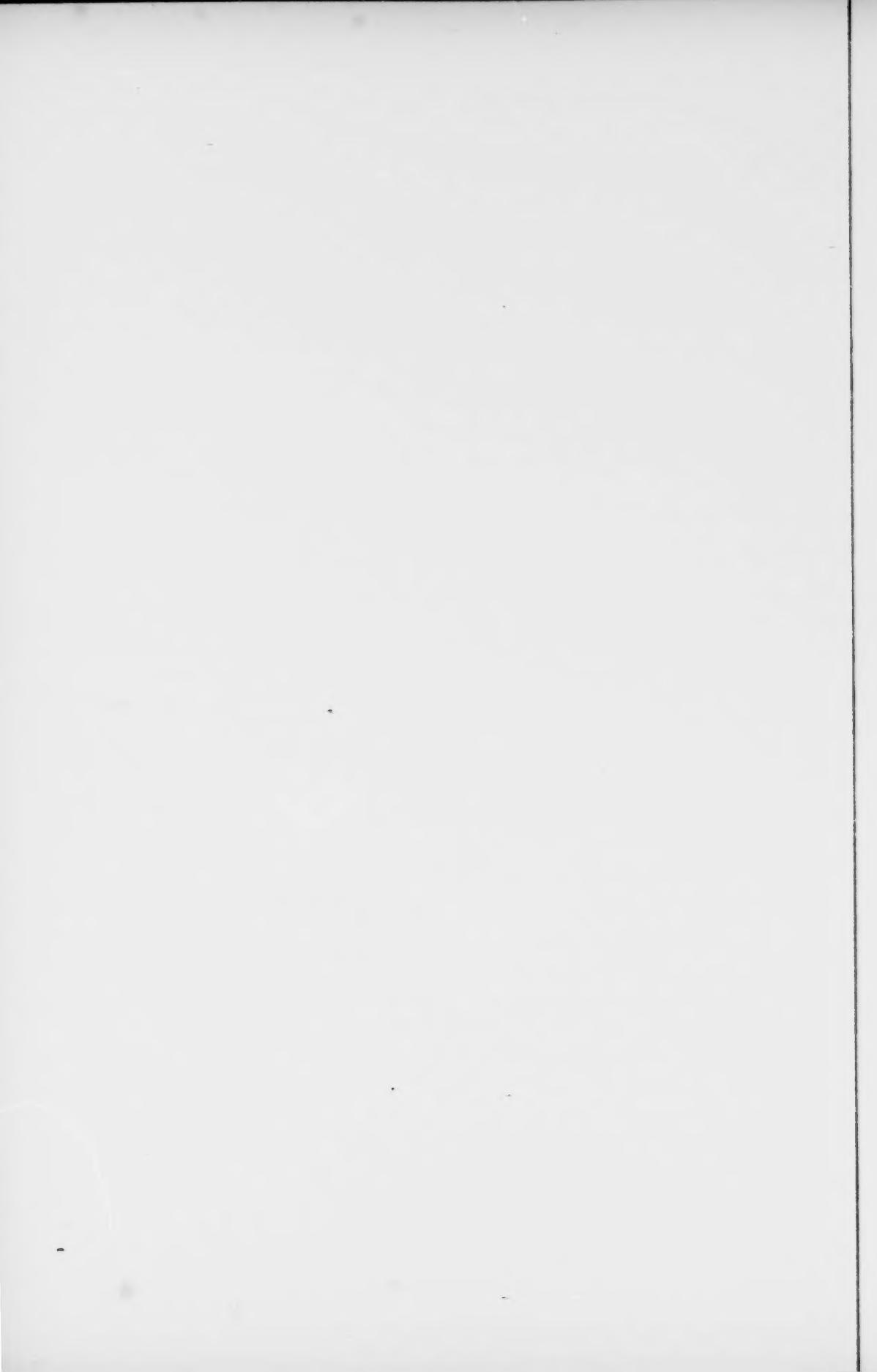
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Harold J. Bender
BENDER & MATUS
200 North McDowell Street
Charlotte, North Carolina 28204
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Counsel for Petitioner



QUESTION PRESENTED

**Is a continuing mail or wire fraud
crime a "straddle crime" calling for the
application of the Federal Sentencing
Guidelines?**



DESIGNATION OF PARTIES

Petitioner Oscar Theodore Polk, III
is serving a 27 1/2 year sentence under
the supervision of the United States
prison system. He is represented by
privately retained counsel. Respondent
is the Government.



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OPINION BELOW

A copy of the published Opinion of the Court of Appeals whose judgment is sought to be reviewed is attached hereto in the Appendix (App. 1-6). The Judgment denying the Petition for Rehearing is attached hereto in the Appendix (App. 7-8).

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the Fourth Circuit denying the Petition for Rehearing was entered on August 3, 1990. This Petition for Writ of Certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

INVOLVED

Title 18 U.S.C. § 1341 provides in part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of fraud or fraudulent pretenses, representations or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or depository for mail matter, any matter or thing or whatever to be sent or delivered by the postal service, . . . shall be fined not more than one thousand dollars (\$1,000.00) or imprison not more than five years, or both.

Title 18 U.S.C. § 1343 provides, in part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice shall be fined not more than one thousand dollars (\$1,000.00) or in prison not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Oscar Theodore Polk, III plead guilty to Counts 1, 3, 4, 33 and 34 in the Indictment which were mail fraud and wire fraud offenses occurring prior to November 1, 1987. For those five counts, the Petitioner was sentenced to five, five year consecutive sentences. Petitioner plead guilty to Counts 2, 15 and 17 in the Indictment which were mail fraud and wire fraud crimes occurring after November 1, 1987. He was sentenced to a thirty (30) month consecutive sentence on those counts.

The Government's case, in the light most favorable to it, tended to show that the Petitioner incorporated a leasing company known as Leasing Associates of the South, Inc. in 1983. Lease agreements for office equipment would be

sold to investors who would receive a 20% to 23% rate of return on their investment. Initially, the leases that were sold to investors were legitimate and all investors were being paid in a timely manner.

During the fall of 1984, the company, through Petitioner Polk, began creating false and fraudulent lease documents. Some of the lease agreements were completely fictitious, while others were legitimate lease agreements that had been previously sold to other investors. During this period of time, investors continued to receive interest payments and many leases were paid in full.

The scheme as devised by the Petitioner was to create false and fictitious lease documents and sell them

to investors so that other investors would continue to receive their monthly interest payments of 20% to 23%.

When it appeared that the scheme could not continue, the Petitioner, through counsel, immediately notified the Federal Bureau of Investigation of his wrongdoing and, during an interview, fully explained the scheme to defraud and his role in the scheme.

Petitioner Polk entered into a plea agreement agreeing to plead guilty to 8 counts. At sentencing, the trial judge imposed a five, five year consecutive sentence on the Petitioner for the pre-November 1, 1987 offenses and a thirty (30) month consecutive sentence on the post-November 1, 1987 offenses.

The Petitioner appealed his sentence

to the United States Court of Appeals to the Fourth Circuit. The Court of Appeals affirmed his sentence.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. The Petitioner, prior to sentencing, consented to sentencing under the Federal Sentencing Guidelines. The sentencing court elected not to sentence the Defendant in accordance with the guidelines for those offenses that occurred prior to November 1, 1987.

The decision of the Court of Appeals for the Fourth Circuit is in conflict with the previous rulings of the Fourth Circuit. Although previous unpublished Opinions from the Fourth Circuit have held that guidelines do not apply to offenses committed prior to November 1,

1987, this is the first published Opinion espousing that view.

However, the Fourth Circuit had previously held that a conspiracy is a continuing offense and that the sentencing guidelines apply to a continuing offense irrespective of the fact that the Defendant's participation in the conspiracy began prior to November 1, 1987. United States v. Vinson, 886 2d 740 (4th Cir. 1989). United States v. Sheffer, 896 F.2d 842 (4th Cir. 1990). See also United States v. Meitinger, 901 F.2d 27 (4th Cir. 1990).

As alleged in the Indictment, the crimes to which Petitioner plead guilty and was sentenced are crimes that are continuing in nature. They are just as continuing in nature as a conspiracy.

The Indictment alleged, and the Defendant plead guilty to, a scheme and artifice to defraud that began sometime in 1984 and continued until April, 1988. The conduct of Petitioner Polk straddled the November 1, 1987 date for implementation of the sentencing guidelines and thus, his conduct and crime was a straddle crime.

The Court of Appeals for the Fourth Circuit in United States v. Cusack, 901 F.2d 29 (4th Cir. 1990) determined that "the application of the guidelines to offenses whose conduct occurs both before and after guidelines November 1, 1987 effective date does not violate the ex post facto clause." Id. p. 32. In the Cusack case, the Court held that a RICO violation was continuing in nature and thus, the application of the

sentencing guidelines to both pre and post November 1, 1987 conduct was constitutionally correct.

The Court of Appeals for the Fourth Circuit failed to consider previous decisions in denying the Petitioner relief. The Petitioner urges the Court for a review of this case because of the erroneous and conflicting decisions of the Fourth Circuit.

2. This is an important question of federal law which has not been, but should be, settled by this Court. Since most circuits have decided cases involving "straddle crimes", this has been an important area of litigation and appeal and will continue to be so. As previously argued in Argument No. 1, the Fourth Circuit has decided that a

conspiracy and a RICO violation are both continuing, "straddle crimes". As such, the sentencing guidelines of 1984 have been made applicable to those crimes.

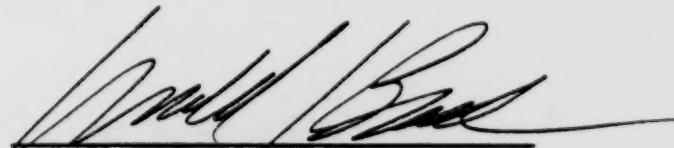
Therefore, it is important that this Court determine whether a continuing mail fraud and wire fraud crime is likewise a straddle crime. Clearly, the indictment in the case involving this Petitioner alleged a continuing offense. This important question of law needs to be decided and determined by this Court because of its importance to the Government and to Defendants who are faced with the same situation as the Petitioner found himself.

CONCLUSION

For the foregoing reasons, the Petitioner Oscar Theodore Polk, III

respectfully requests that this Petition
for Writ of Certiorari be granted.

Respectfully submitted this the 25th
day of October, 1990.

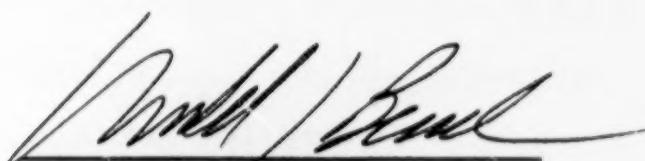


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CERTIFICATE OF SERVICE

I hereby certify that I am a member
of the Bar of this Court and that on this
25th day of October, 1990, one copy of
the Petitioner's Writ for Certiorari was
mailed, first class, postage pre-paid, to
the Honorable Carl Horn, III, Assistant
United States Attorney, Western District

of North Carolina, 401 West Trade Street,
Charlotte, NC 28202 and to the Solicitor
General, United States Department of
Justice, Washington, DC 20530, under
Rule 29.4(a) and 29.5(b) of this Court.



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A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-5449

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

OSCAR THEODORE POLK, III,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Chief District Judge.
(CR-89-31-C)

Submitted: December 29, 1989

Decided: June 1, 1990

Before RUSSELL, WIDENER, and HALL,
Circuit Judges.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Judge Widener and Judge Hall joined.

Harold J. Bender, Charlotte, North Carolina, for Appellant. Thomas J. Ashcraft, United States Attorney, Carl Horn, Chief Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

RUSSELL, Circuit Judge:

Oscar Theodore Polk, III, pleaded guilty to eight counts of mail and wire fraud (18 U.S.C. Section 1341 and 1343). Five of these offenses occurred prior to November 1, 1987, the effective date of the Federal Sentencing Guidelines, while three occurred after that date. The district court held that the Guidelines apply only to offenses occurring on or after November 1, 1987, and sentenced Polk accordingly. For the pre-Guidelines offenses, Polk was sentenced to five consecutive five-year terms and to a thirty-month consecutive term on the

post-Guidelines offenses. This appeal followed. We affirm.

Polk first argues that the district court erred when it denied his motion to be sentenced under the Sentencing Guidelines, guidelines that we find to be inapplicable in this case. The Federal Sentencing Guidelines went into effect on November 1, 1987. See Sentencing Reform Act of 1984, Pub. L. 98-473, Title II, Ch. II, Section 235(a)(2), 98 Stat. 2031, as amended by Section 4 of Pub. L. 99-217, 99 Stat. 1728. However, as enacted, Congress did not specify whether the Guidelines would apply to offenses committed prior to the effective date of the Guidelines. On December 7, 1987, Congress amended the enabling statute and expressly limited the applicability of the Guidelines to criminal offenses

committed after November 1, 1987. See Sentencing Act of 1987, Pub. L. 100-182, Sec. 2(a), 101 Stat. 1266. Therefore, like the other courts that have ruled on this issue, see United States v. Stewart, 865 F.2d 115, 116-17 (7th Cir. 1988); United States v. Haines, 855 F.2d 199, 201 (5th Cir. 1988); United States v. Rewald, 835 F.2d 215, 216 (9th Cir. 1988); United States v. Kelly, 680 F. Supp. 119, 120-21 (S.D.N.Y. 1988), and consistent with our previous unpublished opinions, we hold that the Guidelines do not apply to offenses committed prior to November 1, 1987. Consequently, Polk's claim is meritless.

Polk next argues that the sentence imposed by the district court, a sentence entered within the statutory limits, amounts to cruel and unusual punishment

in violation of the Eighth Amendment. See Solem v. Helm, 463 U.S. 277 (1983). Such an argument has been addressed and rejected by this court in United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988). "Solem does not require a proportionality review of any sentence less than life imprisonment without possibility of parole." Id. at 860. In Whitehead, we further noted that "[t]rial courts are vested with broad discretion in sentencing and, if a sentence is within statutory limits, it will not be reversed absent extraordinary circumstances." Id.

Finally, Polk argues that the district court committed error when it overruled his objections to the pre-sentence report. After a thorough review of the record, we do not find that the

district court's reliance upon the pre-sentence report was clearly erroneous. See United States v. White, 875 F.2d 427 (4th Cir. 1989).

We dispense with oral argument in this case because the facts and legal contentions are adequately presented in the record before us and oral argument will not aid in the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-5449

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

OSCAR THEODORE POLK, III,

Defendant - Appellant.

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for
rehearing and suggestion for rehearing in
banc, and motion for leave to file
petition out of time were submitted to
this Court. As no member of the Court
requested a poll on the suggestion for
rehearing in banc, and

As the panel considered the petition

for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the motion for leave to file the petition out of time is granted and the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell with the concurrence of Judge Widener and Judge Hall.

For the Court,

John M. Greacen
CLERK

Filed, August 3, 1990
U.S. Court of Appeals
Fourth Circuit